No. 15,510

IN THE

United States Court of Appeals

For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,

vs.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska, Division Number One.

BRIEF FOR APPELLEE.

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JURISDICTION.

This is the second appeal of this case. The previous appeal was taken by the defendant below and is cause number 14,505 in this Court. This appeal was taken by the plaintiff below on April 2, 1957, by filing with the District Court a Notice of Appeal (R. 37). The appeal is taken from the Order of the District Court filed March 19, 1957, reinstating judgment on mandate of this Court. Jurisdiction of the District Court rests upon the Act of June 6, 1900, 31 Stat. 322, as amended; 48 U.S.C.A., Section 101, and the jurisdiction of this Court on Section 1291 of the New Federal Judicial Code.

STATEMENT.

Although a general statement and history of this case are provided the Court in the brief for appellants, the following brief statement is included to clarify the history of the case as the appellee views it. The appellant corporation, a salmon-canning employer, originally filed suit to set aside a seasonality regulation restricting unemployment compensation payments to employees of the canned salmon industry. Appellant corporation's amended Complaint, filed June 29, 1953, sought the injunction of enforcement of seasonality Regulation 10, issued by the Executive Director of the Alaska Employment Security Commission, and such other relief as to the court might seem meet in the premises, including the plaintiffs' costs and disbursements and a reasonable sum as attorney fees (R. 14-15, Cause No. 14,505). The same prayer is contained in the Complaint in Intervention of Clara Wilson, filed November 9, 1953 (R. 17, Cause No. 14,505). The judgment and permanent injunction prayed for were granted by the court below on May 12, 1954, but neither interest nor attorney fees or other costs were granted (R. 65-67, Cause No. 14,505). Appeal from this judgment in Cause No. 14,505 was taken by the appellee on June 11, 1954. No question of the disallowance of attorney fees by the court below or of the failure of the court below to grant interest on claims was raised by the appellant in that original appeal. Judgment was issued on a mandate of this Court on August 13, 1956 (R. 3-7), which affirmed the judgment of the District Court. This judgment, which had been prepared by the appellants

herein, did not provide for interest on claims or for attorney fees or other costs. Execution on that judgment was stayed on September 18, 1956, pending disposal by the United States Supreme Court of the petition for writ of certiorari. After the United States Supreme Court had refused certiorari, the appellants herein presented to the District Court an order reinstating judgment on mandate, but with a new request for the allowance of interest on $509,000.00 and an attorneys' fee. After hearing and rehearing these issues, the court below issued its order dated March 19, 1957, reinstating the judgment on mandate of this Court and providing for neither interest nor attorney fees. It is from this order that the appellants herein are appealing.

The present named defendant and appellee in this action, A. B. Phillips, was succeeded in his public office by Arthur A. Hedges on April 16, 1955. No substitution of parties defendant has since been made.

QUESTIONS PRESENTED.

Briefly stated, the questions presented are these:

I. Has the action abated under Rule 25(d) Federal Rules of Civil Procedure?

II. Have appellants waived the right to assert a claim for interest and attorney fees?

III. Is payment of interest and attorney fees barred by the sovereign character of the appellee?

IV. Is payment of interest and attorney fees barred by statute?

SUMMARY OF ARGUMENT.

I.

Rule 25(d) of the Federal Rules of Civil Procedure provides that when an officer of a Territory is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued against his successor in office, but only if his successor is substituted within six months after he assumes office. The present named defendant in this action resigned his public office and was succeeded in that office effective April 16, 1955. No substitution of his successor in office as defendant has been made. Under these conditions we feel that the action should be declared abated.

II.

The Court is not required to review the same case on successive appeals where the demands made in the later appeal were waived by failure to assert them at the proper time. Here, the request for interest was made by the appellants as an afterthought in connection with the entry of an order reinstating a judgment previously entered on the mandate of this Court. It was not sought by its original or amended complaint, nor in the complaint in intervention, nor in connection with entry of the original judgment in this case in May 1954, nor in connection with the first entry of judgment on the mandate of this Court in August 1956. It was only after denial of certiorari by the United States Supreme Court in December 1956 that the unprecedented claim for interest on unemployment benefit amounts was asserted.

Attorney fees were asked in the appellants' original and amended complaint and in the complaint in intervention, but were not granted by the District Court in its judgment entered in May 1954. No assignment of error was made and the question of disallowance of attorney fees was not presented to this Court on the first appeal of the case. Now an appeal is being taken on this question, which was covered, in effect, in this Court's mandate affirming the judgment of the District Court, in which attorney fees were not granted. The question is therefore res judicata.

III.

As the District Court recognized, the real party in interest in this action is the Territory of Alaska, acting through an agency clothed with its sovereignty. Although the monies involved are in a special fund, they are tax monies, and the agency administering them is performing a governmental function. A sovereign is not liable for the payment of interest on its obligations, nor for the payment of attorney fees, unless it has consented by statute to the payment of such charges.

IV.

1. *Territorial Law*: The Alaska Employment Security Act forbids payment of monies received as contributions (taxes) under the Act for anything but "benefits" and refunds, as strictly defined. Therefore, no payment can be made from the fund for attorney fees, either directly or through deduction from claim amounts, or for interest.

By Section 1001 of the Act, liability of the Territory in connection with unemployment compensation is limited to the payment of benefits as defined.

Section 763 of the Act forbids any encumbrance whatsoever upon "benefits" so long as they are not mingled with the funds of the recipient. Therefore, no deduction for attorney fees can be made from the claim amounts.

Sections 762 and 814 of the Act provide for payment of attorney fees from the Commission's administrative fund only in cases of judicial review, and subsequent appeals, of administrative determinations of the Commission. Therefore, these sections do not apply to this action for an injunction.

2. *Federal law:* A serious question of conformity of the Alaska law to requirements for Federal tax offset will be raised if anything but unemployment compensation, as strictly defined, is paid from monies that Alaska receives as taxes under its unemployment compensation law (Sec. 3304(a)(4), Internal Revenue Code of 1954 (Title 26, U.S.C.A.)).

Grants for administration are made for such expenses as the Secretary of Labor deems necessary for the "proper and efficient administration" of the Territory's unemployment compensation law (42 U.S.C.A., Section 502(a)). The Alaska law does not provide for attorney fees in this case, and payment of such fees would not be "proper and efficient administration" of the law.

ARGUMENT.

I. THIS ACTION HAS ABATED UNDER RULE 25(d) FEDERAL RULES OF CIVIL PROCEDURE.

At the outset, we ask the Court to determine whether this action has abated under Rule 25(d) of the Federal Rules of Civil Procedure. (Appendix B) We recognize that this Court has a specific rule on abatement of an action where a party has died while an appeal is pending. (Rule 13) Since this rule does not cover the case of a public officer's resignation while an appeal is pending in an action against him, it appears that the Federal Rules of Civil Procedure will apply. (Rule 8, part 1, Rules of this Court.)

An affidavit showing that the defendant, A. B. Phillips, was succeeded in office by Arthur A. Hedges on April 16, 1955, is included as Appendix A. Rule 25(d) F.R.C.P. provides that an action may be continued by or against the successor of a public officer if within six months after the successor takes office it is shown to the Court that there is a substantial need for so continuing and maintaining it. In so providing, Rule 25(d) sets up the one condition upon which such an action may be continued. A cause is "pending" within the meaning of Rule 25(d) even though an appeal is being sought. (*Danenberg v. Cohen,* C. A. 7th, 1954, 213 F. 2d 944. See also *Snyder v. Buck,* 340 U. S. 15.) The District Court rightly recognized this action to be one against a sovereign, the Territory of Alaska, in its opinion filed January 21, 1957. (R. 11-18) Nevertheless, the named individual defendant is an officer of the sovereign and an individual who has

long since resigned his position of authority with that sovereign. This action is one which enjoins that officer from enforcing a regulation. The effect of the injunction is to require certain action of the officer, i.e., payment of certain claims. Although the claims will be paid from Territorial tax monies (contributions) and sovereign immunity from payment of interest and attorney fees would clearly apply to payments from tax monies, nevertheless the named defendant and his successors in office perform a real function in the case. It is they who pay or refuse payment of claims and who enforce or fail to enforce Regulation 10. Under these conditions, the injunction must act against different individuals as the holder of the Director's position changes. That the successor directors of the Commission have each sought to enforce Regulation 10 is shown by the fact that the process of appeal from the injunction against enforcement of this regulation has been continued while each director was in office. Rule 25(d) provides the way in which the action may be continued against the successors in office and this rule provides a strict time limitation within which substitution must be made. Barron and Holtzoff (*Federal Practice and Procedure,* Rules Edition, Vol. 2, pp. 246-255) discuss the decisions under Rule 25(d) at length, pointing out conflicting circuit court decisions on whether an action abates under the rule where a substitution of *plaintiffs* has not been made within six months of the separation from office of a public official who sued in his official capacity. The following is then stated:

> "The foregoing discussion of a substitution of public officers in actions brought *by them* in behalf of the government which they represent, is not indicative of any relaxation of the rules on actions *against* the officer. As Judge Sandborn pointed out (*Fleming v. Goodwin,* C. A. 8th, 1948, 165 F. 2d 334, cert. denied, 334 U. S. 828) actions against a public officer abate on his separation from office and survive only if a substitution of his successor is made in strict conformity to the rule. This was also the statutory rule." (Emphasis supplied.)

The cases under Rule 25(d) are discussed in *Bowles v. Wilke,* 175 F. 2d 35. The following interesting discussion appears at page 39:

> "The Government has cited cases as being contrary to this conclusion. Examination of these cases shows that in United States v. Koike, 9 Cir., 164 F. 2d 155; Porter v. Maule, 5 Cir., 160 F. 2d 1; United States v. Hirobara, 9 Cir., 164 F. 2d 157; Bowles v. Goldman, D. C. Pa., 7 F.R.D. 12; Bowles v. Ell-Carr Company, Inc., D. C. N. Y., 71 F. Supp. 482; and United States v. Saunders Petroleum Co., Inc., D. C. Mo., 7 F.R.D. 608, the rule was complied with. In Fleming v. Goodwin, 8 Cir., 105 F. 2d 334, certiorari denied, 334 U. S. 828, 68 S. Ct. 1338, the Court concluded that noncompliance with the rule did not abate the action. However, it is interesting to note that the Administrator's successor did file a motion for substitution within the six months period. Hearing on the motion did not occur until after six months had expired. Under these circumstances, it seems apparent that there was no failure to comply with the rule."

It is noted that "The Advisory Committee in October 1955 recommended to the Supreme Court a revolutionary amendment which, if adopted, will remove all limitations of time for substitution of parties". Unless such an amendment of Rule 25 is adopted, there appears to be no provision for enlargement of time for substitution. Rule 6(b) F. R. C. P. specifically provides that ". . . the Court . . . may not extend the time for taking any action under Rule 25 (and certain other rules) except to the extent and under the conditions stated in them."

It appears to appellee that this action has abated and that the Court should so declare.

II. APPELLANTS HAVE WAIVED THE RIGHT TO ASSERT A CLAIM FOR INTEREST AND ATTORNEY FEES.

Should the Court determine that the action has *not* abated, the next question presented is whether this Court should entertain an appeal to rule upon (1) the allowance of interest on claims, a question which could and should have been presented by the appellants at the outset of the action, and (2) the allowance of attorney fees which were prayed for in the prayer of the appellants' complaints and not allowed by the court below. Neither question was raised as a point of error in appeal proceedings. The questions were not raised until after judgment had once been issued on the mandate of this Court.

> "Every existing claim which a party has omitted to make at a hearing on the merits and before final decree is to be considered waived and not

entertained in future proceedings." *The Santa Maria,* 23 U. S. 431.

In this action, not only did the appellants fail to raise the question of interest on claims in the original hearing and in the lengthy appeal through which this case has progressed, but the appellants, in fact, prepared and presented to the Court a judgment on the mandate of this Court which was entered on August 13, 1956, in which no provision for interest or attorney fees was made (R. 3-7). Payment of interest had not been considered in the case until after this final judgment had been entered.

A party generally is estopped, or waives its right to appeal or bring error, where a judgment or decree was entered on its motion. (4 C.J.S., *Appeal and Error,* Sec. 213) It seems inconsistent with the principle of appeal that the appellants, having once procured the entry of judgment without interest or attorney fees, could later reverse their position, ask for interest and attorney fees, and then appeal on the issue when their application for interest and attorney fees was denied. Certainly appellants' silence and presentation of a judgment not providing for interest or attorney fees is inconsistent with their present appeal. Action inconsistent with the appeal generally constitutes an estoppel or waiver. (4 C.J.S., *Appeal and Error,* Sec. 212.)

The allowance of interest on unemployment compensation claims is wholly unprecedented. The claim is one against a sovereign. Under these conditions, the allowance of interest would not be ordinary and in-

cidental to the main action but would be extraordinary. By its mandate in Cause No. 14,505 (R. 4-6), wherein this Court affirmed the judgment of the court below, which provided for payment of claims without interest (R. 65-67, Cause No. 14,505), this Court has in effect acted once on the question of allowance of interest, and the matter is *res judicata* on a second appeal. Similarly, the Court's mandate may be considered to cover the matter of attorney fees, but for a different reason: Attorney fees were denied by the District Court and this Court affirmed the District Court's judgment. The District Court did not err, since that court cannot vary a mandate of the Circuit Court of Appeals or give any further relief. (*Kansas City Southern Railway v. Guardian Trust Company,* 281 U. S. 1.) Likewise, the reviewing court should not be called upon to rule upon a matter which had already been disposed of by its mandate. These matters are the "law of the case".

Appellants base much of their claim for interest and attorney fees upon *Sprague v. Ticonic National Bank,* 307 U. S. 161. Since that action was not against a sovereign, it has little application to this one; however, the cases are distinguishable on various additional grounds: The plaintiff and appellant in that suit, in addition to asking for monies withheld by the bank, had asked originally for interest on these monies and it was allowed. (*Ticonic Bank v. Sprague,* 303 U. S. 406.) Since interest had been sought throughout the action, no question of waiver or estoppel arose on the interest question in the *Sprague*

case. Mrs. Sprague did not assert her right to attorney fees until issuance of judgment on the Circuit Court's mandate. An appeal was allowed on the District Court's denial of appellant's petition for attorney fees. In allowing attorney fees, the court in the *Sprague* case recognized the *Kansas City Southern Railway* case, supra, as stating the accepted rule that the District Court cannot vary a mandate of the Circuit Court of Appeals or give any further relief, but the Circuit Court distinguished the *Sprague* case by the fact that the question of attorney fees had not previously been raised in the case, and that therefore, under the particular facts of that case, allowance of attorney fees was not foreclosed by the mandate. This case is altogether different. Here the appellants asked for attorney fees in their amended Complaint and in the Complaint in Intervention. (R. 14-17, Cause No. 14,505). Attorney fees were disallowed (R. 66-67, Cause No. 14,505). The matter was not mentioned again by either party through the lengthy appeal of this case. Judgment on this Court's mandate, as prepared and presented to the court below by the appellants, made no provision for attorney fees. Thereafter, appellants decided to bring up again the request for attorney fees which had been turned down by the District Court in the judgment which went through the whole appeal process to denial of certiorari by the Supreme Court. Since attorney fees have been sought in the District Court and denied, their allowance was necessarily involved in the first appeal. It is accepted that:

> "Questions raised on a second appeal which might have been raised and determined in the former appeal are res judicata." *Clark v. Brown,* 119 F. 130.
>
> "Causes should not be brought up in fragments upon successive appeals." *Canter v. American Insurance Co.,* 3 Pet. 307.

In the *Canter* case cited above, the U. S. Supreme Court also repeats the general rule which we urge the Court to consider in this case: "No appeal lies in a mere decree respecting costs."

III. PAYMENT OF INTEREST AND ATTORNEY FEES IS BARRED BECAUSE OF THE SOVEREIGN CHARACTER OF THE APPELLEE.

The trial court recognized that this is an action against a sovereign. The District Court notes that the Commission was performing an essential governmental function and that the Director was acting on legislative mandate in promulgating Regulation No. 10 (R. 16). "The test" (according to *American Jurisprudence on States, Territories and Dependencies,* Section 8) "of whether a particular activity may rightly be called a duty or an obligatory function of government, is whether the welfare of the state as a whole is substantially promoted by or involved in its exercise." By this test, the Employment Security Commission is clearly an instrumentality of the government acting in its sovereign capacity. Whether the monies involved are in the general or a special fund

is not material. Although the nominal party defendant in this action is the former executive director of the Commission, the real party in interest is the Territory of Alaska, represented by an agency clothed with its sovereignty, the Alaska Employment Security Commission. The relief granted plaintiffs in this case is to enjoin a public official from performing a function relating to the office that he then held. The prayer does not seek to enjoin an individual act of this officer, personal in nature, but rather an act which directly relates to the ordinary duties of his office. The action is in fact against the Territory of Alaska. Because of the sovereign character of the appellee and the absence of statutes authorizing interest or attorney fees, the court below recognized that "no interest can be awarded nor can any costs be allowed." (R. 17.)

The appellants, at pages 13-15 of their brief, state their disagreement with the court below and urge that the Territory in its sovereign capacity is not the defendant in this case nor interested in the litigation. Appellants argue that if the Territory in its sovereign capacity were defendant in this action, funds should not have been set aside or "impounded" pending appeal. We submit that the question of whether the appellee is clothed with sovereign immunity from the payment of interest and attorney fees cannot hinge upon whether the District Court was right or wrong in protecting a fund for the claimants in this action pending appeal.

In pointing out that the liability of the Territory and the Commission is limited to payments provided

for in the Alaska Employment Security Act (Appellants' Brief, p. 15), the appellants are not presenting a reason why the Territory, as a sovereign, is not involved in the case. Rather, the appellants appear to be admitting that no liability for interest or attorney fees exists unless it may be found by statute. As we later point out in this brief, no provision for interest appears in the statutes of the Territory and in fact the payment of interest on benefit claims is prohibited by Territorial and Federal law. The case of *Mullaney v. Hess,* 189 F. 2d 417, can scarcely be considered a precedent for payment of interest in this case. That was an action in which interest was allowed on tax refunds. Such interest is expressly prohibited by the Employment Security Law. (Sec. 51-5-14, ACLA 1949; Sec. 518, Ch. 5, ESLA 1955). Appellants close their argument for interest with a reference to the *Sprague* case, supra, in support of their argument. (Appellants' Brief, pp. 15-16) In *Ticonic National Bank v. Sprague,* the court does provide for interest, but refers to *U. S. v. North Carolina,* 136 U. S. 211, 216, for comparison. Obviously, the comparison is to allowance of interest against a private bank and the disallowance of interest against a sovereign under similar circumstances.

The fact that the unemployment trust fund draws interest (albeit at a low rate) does not distinguish this case from the others on sovereign immunity. Of course, monies of a sovereign will draw interest, even if deposited in a private bank. But public policy has dictated the rule that a sovereign shall not pay in-

terest on its obligations, unless by statute it clearly agrees to do so.

As the court below recognized, the general Territorial statute on interest (Sec. 25-1-1, ACLA 1949) does not render the Territory liable for interest. As the District Court says with regard to plaintiffs' application for interest (R. 15):

> ". . . The case of United States v. North Carolina, 136 U. S. 211, sets forth the rule that '. . . the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid.' This holding has been widely supported in other jurisdictions: United States v. Nez Perce County, Idaho (9th Circ., 1938), 95 F. 2d 238; Boxwell v. Department of Highways, 14 So. 2nd 627, 203 La. 760; State Highway Commission v. Mason, 6 So. 2nd 468, 192 Miss. 576; Culver v. Commonwealth, 35 A. 2nd 64, 348 Pa. 472."

Application of the rule of sovereign immunity to this case is illustrated by the lack of any precedent for payment of interest on delayed unemployment compensation claims. Surely, were there any precedent for payment of interest on unemployment compensation claims, appellants would cite it. We have searched, and are convinced that such interest payments are unprecedented.

The rule on the application of a general statute on attorney fees to a sovereign is just as explicit. Again quoting the District Court's opinion (R. 16):

> "A similar rule has been followed by the courts on the question of costs. In Ridge v. Boulder

Creek Union Junior-Senior High School District of Santa Cruz County, 140 P. 2nd 990, 60 Cal. App. 2nd 453, the Court stated:

> " 'General statutes allowing costs to parties have been construed not to apply to the state in the absence of express provision respecting costs where the state was a party.' See also Boland v. Cecil, 150 P. 2nd 819; Costs, 14 Am. Jur., 22, Sec. 34; Territories, 86 C.J.S. 647, Sec. 38."

IV. PAYMENT OF INTEREST AND ATTORNEY FEES IS BARRED BY STATUTE.

(1) Payment of attorney fees or interest would be in conflict with Territorial law.

(a) Payment cannot be made from the unemployment fund.

The statutes applicable to allowance of interest or attorney fees in this action were presented to the District Court, and their effect was carefully considered by that Court. We therefore urge the most careful consideration by this Court of the District Court's opinions of January 21, 1957, and March 14, 1957. (R. 11, 28.) The court below, in its second opinion, corrects its first opinion wherein it provided for payment of attorney fees by deduction of the same from unemployment benefits. That court, in its March 14 opinion, recognizes that Section 763, Ch. 5, ESLA 1955, "precludes the impressing of benefits due the claimants with any lien whatsoever" so long as they are not mingled with other funds of the recipient. As the District Court notes, "these funds have not been so mingled and cannot be until they have been

actually paid over to each claimant." (R. 31) Section 763 reads as follows:

> "*Exemption of Benefits.* Any assignment, pledge, or encumbrance of any rights to benefits which are or may become due or payable under this Act shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessities furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this section shall be void."

The statute expressly declares any encumbrance on benefits to be void. However, appellants urge a construction of the statute which would permit an encumbrance for "necessaries", and then urge that attorney fees are "necessaries" in this case. We submit that a careful reading of Section 763 will show its purpose to be to absolutely prohibit assignment or encumbrance of benefits in order to carry out the purpose of the Act, which is to furnish maintenance during periods of unemployment, not relief for creditors. But legal action is permitted to collect debts incurred for necessities during periods of unemployment, so that a person may, while unemployed and in need, obtain credit on the strength of his unemployment benefits. Counsel fees in this action do not constitute "debts incurred for necessities furnished to

such individual or his spouse or dependents during the time when such individual was unemployed", and Section 763 makes these debts the only ones for which unemployment benefits may be encumbered. Although the appellants would have the Court look beyond the terms of Section 763, we submit that the Court is limited by the terms of the statute, as set out above. Surely the Court should not extend this provision beyond its terms to permit encumbrance of benefits with counsel fees in a suit brought by a third party primarily for its own benefit to effect a tax saving. (See Complaint, R. 3-15, Cause No. 14,505.)

Section 763, discussed above, specifically prohibits the deduction of such charges as attorney fees from unemployment benefits. The more general provisions of the Employment Security Act also show this prohibition very clearly. Like all state unemployment insurance acts, the Alaska Act requires that all monies received as contributions (employment taxes) be deposited, immediately upon their clearance, with the Secretary of the Treasury of the United States to the credit of the Territory's account in the Unemployment Trust Fund. Sec. 51-5-9(b), ACLA 1949, (now Sec. 402, Ch. 5, ESLA 1955.) Section 51-5-9(c), ACLA 1949 (now Sec. 404, Ch. 5, ESLA 1955, as amended) then provides:

> "*Withdrawals.* In accordance with regulations prescribed by the Commission, moneys shall be requisitioned from the Territory's account in the Unemployment Trust Fund *solely for the payment of benefits and refunds* * * *" (Emphasis supplied.)

Thus it will be seen that strict control of monies is imposed by law from the moment of their collection, and that these monies can be used "solely" for the payment of "benefits" and "refunds".

The fund from which the appellants are asking this Court to grant interest and attorney fees is the Unemployment Trust Fund referred to above, and the fund from which no withdrawals can be made excepting for payment of benefits and refunds. In the strict sense of the term, no sum has ever been actually "impounded" in this case; rather, with approval of the District Court, the balance of $650,000 has always been maintained and is now maintained as an undivided part of the Territory's account in the Unemployment Trust Fund, which is maintained in the United States Treasury. In order to pay the claims involved in this action, withdrawals must be made from the Unemployment Trust Fund in the same manner as for payment of any other benefit claims and the same restrictions will apply.

The provisions of state laws relating to disbursement of monies from the Unemployment Trust Fund must be strictly construed. The pertinent section from Corpus Juris Secundum is quoted as follows in its entirety:

> "The unemployment compensation fund should be disbursed only in accordance with the strict terms of the statute. Payments out of the Unemployment Trust Fund established by the Federal Social Security Act, 42 U.S.C.A., Sec. 1104, are required to be made on requisition of the State Agency, and withdrawals from the Federal Un-

> employment Trust Fund of State funds *may be only for the purpose of paying unemployment benefits.*" 81 C.J.S., Social Security, Sec. 241. (Emphasis supplied.)

In *Illinois v. United States,* 328 U. S. 8, in the following words, the United States Supreme Court recognizes that "State funds must be paid into the United States Treasury, to be credited to a special fund, and can be withdrawn only for paying unemployment benefits." See also *Howes Brothers Company v. Massachusetts Unemployment Compensation Commission,* 5 N.E. 2d 720, at pages 728-729 (Certiorari denied, 300 U. S. 657.)

State unemployment compensation laws are based upon strict definitions of terms. The principle was clearly recognized by this Court in *New England Fish Co. v. Vaara,* (1951), 98 F. Supp. 492 (affirmed 190 F. 2d 848), a case which turned upon the strict definition of the terms "contributions" and "surplus". "Benefits" is also a term bearing such an exacting statutory definition. Sec. 51-5-1(b), ACLA 1949 (now Sec. 204, Ch. 5, ESLA 1955), provides that " 'Benefits' means the money payments payable to an individual, as provided in this Act, with respect to his unemployment". Sec. 51-5-2(b)(2) (now Sec. 713, Ch. 5, ESLA 1955), provides that "each eligible individual who is 'unemployed' in any week shall be paid with respect to such week a benefit in an amount equal to his weekly benefit amount . . ." "Weekly benefit amount" is set at a varying but definite amount by a table which immediately precedes this

section. Thus the Commission is strictly limited in how it may use monies received as contributions (unemployment tax); these monies can be used only to pay "benefits" and to make refunds, and "benefits" means weekly amounts set out in a table which is part of the law. These amounts do not include interest. Neither do they include provision for attorney fees. Appellants point out that the monies in the Unemployment Trust Fund earn a varying low rate of interest (Sec. 1104, Title 42, U.S.C.A., pocket part), and because of this they urge that the interest earned should either (1) be paid to the claimants who benefit from this action (Appellants' Brief, p. 11), or (2) be used as a fund from which attorney fees would be paid (Appellants' Brief, p. 25). Here again, the statutory restriction on payments from the Unemployment Trust Fund applies, since interest on the fund becomes part of it (42 U.S.C.A., Sec. 1104(e)), and cannot be withdrawn except to pay benefits and refunds. Here also, sovereign immunity from payment of interest applies, as we have pointed out in the third section of our brief.

The liability of the appellee under the Alaska Employment Security Act is a liability created by statute, and the statute has definitely limited the extent of liability to payment of "benefits" and refunds. The limitation of liability is made explicit in Sec. 1001, Ch. 5, ESLA 1955, which is substantially a re-enactment of Sec. 51-5-19, ACLA 1949. This section, which is also set out in appellants' brief at page 15, reads:

> "Non-Liability of Territory. *Benefits* shall be deemed to be due and payable under this Act *only* to the extent provided *in this Act* and to the extent that moneys are available therefor to the credit of the Unemployment Fund, and the liability of the Territory and the Commission shall be limited accordingly." (Emphasis supplied.)

We have searched the Act, and can find no authority for payment of either interest or attorney fees.

(b) Payment cannot be made from the administrative fund.

Confusion may arise from appellants' statement at page 21 of their brief on the origin of the administrative fund of the Commission. This fund is made up of monies granted to the Commission by the Federal Government for payment of expenses deemed by the Secretary of Labor to be necessary for the "proper and efficient administration" of the Territory's unemployment compensation law. (Sec. 302 of the Social Security Act) Thus, payments from this fund are controlled by the Secretary of Labor.

The appellants seek attorney fees from the administrative fund based upon two sections of the Alaska Employment Security Act. Section 762 of the Act (Appendix C) limits the amount of fees that may be charged an "individual claiming benefits" to an amount that the Commission or the court approves as reasonable. But as the District Court recognized in its opinion of March 14, 1957 (R. 29), "the Fidalgo Island Packing Company cannot be considered as a claimant within the meaning of the statute, since it

merely sought an injunction forbidding the enforcement of amended Regulation 10." The same is true of the Intervenor, who also merely sought an injunction of enforcement of the regulation, and was not even a seasonal employee. Even if Section 762 would authorize the Court's *approving* an amount which appellant's attorneys could charge the claimants who benefit from this case for attorney fees (and it does not in this case), the section says nothing about charging the *Territory* with these fees or about the Court's *directly charging* the claimants with them as part of its judgment.

Section 814 of the Act (Appendix D) is also cited by the appellant. This section is applicable to judicial review, and subsequent appeals, of administrative determinations of the Commission. In other words, the purpose of this section is to allow attorney fees in certain specified cases where, after administrative procedures have been exhausted, judicial review of the administrative determinations is sought. The section begins, "An attorney at law representing a claimant on appeal to the courts shall be entitled to a reasonable counsel fee . . ." "Such counsel fees" are referred to later in the section, and this serves to modify the reference to specific appeals in which counsel fees will be paid. Thus the reference in Section 814 to appeals from judicial decisions or from a decision of the court is to further appellate review of the decision of the initial reviewing court.

To understand the application of Section 814, it is almost imperative that its position in the Act be

looked to. Section 814 is set forth in Article VIII, which relates to administrative determinations under the Act and the judicial review of such determinations. One can fairly conclude, therefore, that Section 814, which is the last section in this article, was intended to apply to the judicial review of decisions referred to in the immediately preceding sections of the article. As a consequence, this section does not apply to the instant action, which is an action for an injunction. Neither plaintiff nor intervenor sought a review of an administrative decision of the Commission, so neither is a "claimant" within the scope of Section 814. Furthermore, since the intervenor was not in fact a "seasonal" employee, any basis she may have for claiming attorney fees under Section 814 is indeed remote. As statutes allowing attorney fees against a sovereign are statutes in derogation of the common law, they must be strictly construed. (82 C.J.S., *Statutes,* Sec. 393, p. 938; *Ransom v. Williams,* 69 U. S. 313; *Brown v. Berry,* 3 U. S. 365.) Certainly, under this rule, such a statute as Section 814 should not be extended to allow attorney fees in a type of action that it was never intended to cover.

The appellants suggest the application of certain maxims of equity to this case. While these maxims are convenient to quote, they are sometimes contradictory, and are always subject to the principle which the District Court recognizes in its March 14 opinion: "Whenever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules." (R. 32) This principle is set out in

Pomeroy's *Equity Jurisprudence,* Fifth Edition, Sec. 425:

> "Courts of equity may no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law . . .
>
> "Whenever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules."

Appellants' attorneys assert that a wrong would be allowed to exist without a remedy if they are unable to deduct a fee from benefit amounts. This is not the case. Any cannery employee whose application for unemployment benefits had been denied could have followed the clearly-defined procedure for appealing through administrative channels to the courts. Had this procedure been followed, presumably attorney fees would have been allowable to the claimant under Section 814. However, that question is not before the Court, since no administrative remedy was sought by any claimant. This is a suit for injunction brought by an employer primarily to avoid payment of increased tax. The intervenor, since not a seasonal employee, could hardly have suffered a "wrong" by enforcement of Regulation 10.

2) Payment of attorney fees and interest on claims would raise serious questions of compliance with Federal law and would therefore threaten the continuance of the employment security program in Alaska.

The effect of Federal law is of vital importance in this case. A question is presented as to whether or not,

if attorney fees are deducted from claim amounts, or if interest is paid on the claims, the Alaska unemployment compensation law can be certified by the Secretary of Labor for allowance of the Federal unemployment tax credit and for Federal grants for administration. The relevant Federal requirements are set forth in Section 3304(a)(4) of the Internal Revenue Code of 1954 (Title 26, U.S.C.A.) and 42 U.S.C.A., Sections 503(a)(1) and 503(a)(5).

The Federal Unemployment Tax Act (Int. Rev. Code of 1954, 26 U.S.C.A., Secs. 3301, et seq.) imposes an excise tax of three percent of the first $3,000 of wages paid by employers of four or more persons. A credit against this tax is allowed to an employer to the extent of contributions paid by him into a State unemployment fund, under an unemployment compensation law of a state certified by the Secretary of Labor under Section 3304(a). Section 3304(a) of the Code directs the Secretary of Labor to approve a state unemployment compensation law if he finds that such law contains certain enumerated provisions. Under Section 3304(c) of the Internal Revenue Code, the Secretary of Labor is required on December 31 of each taxable year to certify to the Secretary of the Treasury each state which he finds has amended its law so that it no longer contains the provisions required by Section 3304(a) of the Code, or has, with respect to such taxable year, failed to comply substantially with such provisions. A finding by the Secretary of Labor that the state has failed to comply substantially with any of such provisions, will result

in a non-certification of the state and a consequent disallowance to the employers within such state of any credit for the three percent Federal unemployment tax.

A certification by the Secretary of Labor is likewise necessary for states to receive grants for administration of their unemployment insurance laws. Under 42 U.S.C.A., Sec. 502(a), the Secretary of Labor is required to certify to the Secretary of the Treasury for payment to each state, such amounts as he considers necessary for the proper and efficient administration of its unemployment compensation law. No certification for Federal grants may be made to any state, however, unless the Secretary of Labor finds that the law of such state contains the provisions enumerated in 42 U.S.C.A., Sec. 503(a). Moreover the Secretary shall not certify any state if he finds that there has been a failure by such state to comply substantially with any of the provisions set forth in 42 U.S.C.A., Sec. 503(a). A finding either that the law of the state, as construed by the court, does not contain the required provisions, or that there has been a substantial failure to comply with any such provision, will result in this Territory's not receiving grants for administration of its employment security program.

Two basic Federal requirements are here involved. (Appendix E) The first, as set forth in 42 U.S.C.A., Sec. 503(a)(1), requires the law of the state to include a provision for such methods of administration as are found by the Secretary of Labor to be reason-

ably calculated "to insure *full* payment of unemployment compensation when due." (Emphasis supplied.) The second, which is set forth both in 42 U.S.C.A., Sec. 503(a)(5) and Sec. 3304(a)(4) of the Internal Revenue Code (Title 26, U.S.C.A.), requires in substance that all monies withdraw from the unemployment fund of the state be used, with certain exceptions not pertinent here, in the "payment of unemployment compensation."

Although these required provisions have been substantially adopted in the Alaska Employment Security Act, the question of whether that Act, as construed by the Territorial authorities and the courts, meets the Federal requirements is for the determination of the Secretary of Labor. It is the position of the Bureau of Employment Security of the United States Department of Labor[1] that a construction of the Territorial law permitting the deduction of attorney fees from payments to claimants for unemployment compensation violates both of the above requirements of the Federal law, and that payment of interest on claims would violate the provisions of Section 3304(a)(4) of the Internal Revenue Code.

"Compensation" is defined in Section 3306(h) of the Internal Revenue Code as "*cash benefits* payable to individuals with respect to their unemployment" (Emphasis supplied.) The Alaska law, if construed

[1]So stated in memorandum of law received from Regional Attorney for Dept. of Labor, February 18, 1957.

to allow a deduction from benefit amounts for attorney fees, would not provide for methods of administration to insure *full* payment of cash benefits for unemployment. Further, an award for attorney fees is not "cash benefits" payable to claimants for their unemployment, and thus, monies may not be withdrawn from the unemployment found for this purpose. Likewise, since "cash benefits" are a definite statutory amount without provision for interest, monies may not be withdrawn from the unemployment fund for payment of interest, and if the Alaska law were construed to provide for such a withdrawal for payment of interest, it would provide for withdrawal for a purpose other than for the payment of "unemployment compensation".

Payment of attorney fees and interest is clearly not payment of unemployment compensation, as defined in either the Federal or Territorial statute. Under Section 3304(a)(4) of the Internal Revenue Code of 1954, and under 42 U.S.C.A., Sec. 503(a)(5), monies withdrawn from the unemployment trust fund may be used only for the payment of unemployment compensation. The law as construed by the appellants would not meet such requirements. Accordingly, as we were advised at the time we argued this matter to the District Court, if attorney fees or interest are granted in this case, the Bureau of Employment Security of the United States Department of Labor is prepared to recommend to the Secretary of Labor, for his consideration under the procedures provided therefore, the question of whether the Territory of

Alaska, as a result of the order of this Court, has failed to meet the Federal requirements.

One further look at Federal law is important. The administrative fund of the Commission, from which appellants seek attorney fees as an alternative to their allowance under the "salvage" theory, is made up of "such amounts as the Secretary of Labor determines to be necessary for the proper and efficient administration" of the Territory's unemployment compensation law (42 U.S.C.A., Sec. 502(a)). The Bureau of Employment Security has advised us[2] that it does not deem the payment of attorney fees in this case to be necessary for the "proper and efficient administration" of the Territory's unemployment compensation law.

CONCLUSION.

For the reasons set out in this brief, the appellee submits that neither interest nor attorney fees can be allowed the appellants. Because of the Federal requirements for offset against the Federal Unemployment Tax, the issues are of far-reaching importance to the Territory of Alaska. Allowance of these charges would jeopardize the tax offset and therefore would jeopardize the continuance of the employment security program in Alaska.

The District Court gave the issues of this appeal extremely careful consideration on original hearing

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[2]Telegram from Regional Director, quoting Solicitor's Office received December 27, 1956.

and rehearing. We urge that this Court carefully review the opinions of the District Court filed January 21 and March 14, 1957 (R. 11-18; 28-33). The District Court's ultimate conclusions on these issues are correct.

Dated, Juneau, Alaska,
May 31, 1957.

Respectfully submitted,
J. GERALD WILLIAMS,
Attorney General of Alaska,
DICKERSON REGAN,
Attorneys for Appellee.

(Appendices "A", "B", "C", "D" and "E" Follow.)

Appendices.

APPENDIX "A"

AFFIDAVIT

UNITED STATES OF AMERICA)
: ss.
TERRITORY OF ALASKA)

JAMES B. CAULEY, having first been duly sworn on oath depose and says:

That he is and has been continually for the past several yea the Fiscal and Personnel Officer of the Alaska Employment Security Commission, and that he has custody of the fiscal and personnel record of said Commission;

That A. B. Phillips resigned his position as Executive Direc of said Commission and severed all connection with said Commission eff tive with the close of business April 15, 1955;

That Arthur A. Hedges assumed the office of Acting Executive Director of said Commission effective April 16, 1955, and held this position until January 21, 1956; thereafter Dickerson Regan held the office of Director from February 23, 1956, until June 18, 1956; his successor in office and the present holder of the office of Director is M. E. Weir.

James B. Cauley
James B. Cauley

Subscribed and sworn to before me this 31 day of May, 1957.

Dickerson Regan
Dickerson Regan
Notary Public for Alaska
My commission expires 9/16/57

(S E A L)

Appendix "B"

FEDERAL RULES OF CIVIL PROCEDURE, RULE 25 (d).

"*Public Officers: Death or Separation from office.* When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. As amended Dec. 29, 1948, Eff. Oct. 20, 1949.

Appendix "C"

SECTION 762, CHAPTER 5, EXTRAORDINARY SESSION LAWS OF ALASKA.

Limitation of Fees: No individual claiming benefit shall be charged fees of any kind in any proceedin under this Act by the Commission or its representa tives, or by any court or any officer thereof. Any in dividual claiming benefits in any proceeding befor the Commission or its representatives or a court ma be represented by counsel or other duly authorize agent; but no such counsel or agent shall either charg or receive for such services more than an amount ap proved by the Commission or the Court. Any perso who violates any provision of this section shall, upo conviction thereof, for each offense, be fined not mo than $500.00, or imprisoned for not more than si months, or both.

Appendix "D"

SECTION 814, CHAPTER 5, EXTRAORDINARY SESSION LAWS OF ALASKA.

Fees of Attorneys for Claimants on Appeals to Courts. An attorney at law representing a claimant on appeal to the courts shall be entitled to reasonable counsel fees as fixed by the court not to exceed $300 and necessary court costs and printing disbursements not exceeding $150. In difficult cases the court to which the appeal was taken may, upon application of counsel for the claimant, increase such fees, court costs, or disbursements to an amount which the court deems reasonable. Such counsel fees, costs, and disbursements shall be paid by the commission out of employment security administration funds in each of the following cases: (a) any court appeal from an administrative or judicial decision favorable in whole or in part to the claimant, (b) any court appeal by a claimant from a commission decision which reverses a tribunal decision in his favor, (c) any court appeal as a result of which the claimant is awarded benefits, or (d) any court appeal by a claimant from a decision by a tribunal, commission, or court which was not unanimous.

Appendix "E"

The two requirements are as follows:

Social Security Act, Sec. 303 (a) (42 USCA, Se 503 (a)): "The Secretary of Labor shall make n certification for payment to any State unless he find that the law of such State, approved by him under th Federal Unemployment Tax Act, includes provisio for—

(1) Such methods of administration (inclu ing after January 1, 1940, methods relating to th establishment and maintenance of personal stan ards on a merit basis, except that the Secretary Labor shall exercise no authority with respect t the selection, tenure of office, and compensatio of any individual employed in accordance wit such methods) as are found by the Secretary Labor to be reasonably calculated to insure fu payment of unemployment compensation wh due; and

(5) Expenditure of all money withdrawn fro an unemployment fund of such State, in the pa ment of unemployment compensation, exclusive expenses of administration, and for refunds sums erroneously paid into such fund and refun paid in accordance with the provisions of secti 1606(b): *Provided,* That an amount equal to t amount of employee payments into the unemplo ment fund of a State may be used in the payme of cash benefits to individuals with respect to the disability, exclusive of expenses of administr

tion: *Provided further,* That the amounts specified by section 1103(c)(2) of this title may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices; * * *."

nternal Revenue Code, Sec. 3304 (a) (4) (Title 26, SCA): "* * * all money withdrawn from the unployment fund of the state shall be used solely in te payment of unemployment compensation, exclusive c expenses of administration, and for refunds of sms erroneously paid into such fund and refunds uid in accordance with the provisions of section 305 (b); except that—

(A) an amount equal to the amount of employment payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration; and

(B) the amounts specified by section 903 (c) (2) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices; * * *."